2002/06/18 - PL. ÚS 7/02: JUDICIARY ACT

HEADNOTES

In the preamble to the Constitution and its Art. 1, in the introductory declaration to the Charter, as well as in international treaties under Art. 10 of the Constitution, the Czech Republic subscribes to the time-tested principles of a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens (Art. 1 of the Constitution) and on democratic values (Art. 2 para. 1 of the Charter). In this state, under Art. 2 para. 1 of the Constitution the people are the source of all state authority, and exercise it through the legislative, executive and judicial bodies. One can conclude, just from this introductory statement that the very foundation of our constitutional system enshrines the principle of separation of state power, a principle, derived from the idea that human nature has a tendency to concentrate power and misuse it, which has become a guarantee against arbitrariness and misuse of state power and basically also a guarantee of freedom and protection of the individual, a principle which is the result and reflection of historic, intellectual and institutional development until now, which, in the modern age for example, involved such distinctive people as John Locke and Charles Montesquieu, and institutions such as the British Parliament and the British judiciary. It is not the task of the Constitutional Court, in a situation which can be considered given, to concern itself more closely with the development and causes of this principle. Nevertheless, it considers it necessary to briefly state that the very foundations of this principle contain the conviction, based on empirical experience, that human thought and social events could never be ascribed a solely rational nature, as they also contained evident irrational elements, and moreover, rationality of thought has never fully coincided with rationality of behavior. As an expression of the existing condition, "government by all" is a mere ideological formula, often hiding a completely contrary social situation. In a social situation characterized by the internal and external inadequacy of the individual and the entire society, basic human needs can be satisfied, and at the same time at least the direction toward the goal of democracy maintained, only by the path of conflict-based balancing of individual interests. Thus, although even a democratic state does not strive for maximalistic programs in the area of the judiciary, and is therefore quite far from the idea of a "judicial state" - the bodies of state power include, as already stated, the legislative and executive power, and therefore this state power can be functionally implemented in a democratic system only on condition that all its bodies function - on the other hand it is required to create institutional prerequisites for what is, as far as the judiciary is concerned, characteristic and unconditional, i.e. the formation and establishment of true independence of the courts, as an important state-creating, but also polemical element, not only for the stabilization of their position but of the entire democratic system, in relation to the legislative and executive branches. This true independence of the courts is a characteristic and indispensable attribute of the judicial power, justified and also required by Art. 4 of the Constitution, under which the fundamental rights and freedoms enjoy the protection of the judicial bodies, as well as by Art. 81 and Art. 82 of the Constitution, under which the judicial power is exercised in the name of the Republic by independent courts, and judges are independent in the exercise of their

duties and no one may endanger their impartiality. Therefore, this characteristic feature and content of the judicial power cannot be cast in doubt, and therefore even its basic functions are not compatible with any manner of infiltration by any other state power, which premise was expressed in the Constitutional Document of the Czechoslovak Republic introduced by Act No. 121/1920 Coll. by § 96 para. 1, under which the judiciary is separate from administration in all instances, and in the current Constitution in Art. 82 para. 3, under which the office of a judge is incompatible with the office of the President of the Republic, a member of Parliament, or any office in public administration. Thus, the principle of judicial independence is, in this regard, of an unconditional nature which rules out the possibility of interference by the executive power. However, the contested legal regulation does not meet this requirement.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court decided on the petition from the President of the Republic, Václav Havel, to annul certain provisions of Act No. 6/2002 Coll., on the Courts, Judges, Lay Judges and the State Administration of the Courts and Amending Certain Other Acts (the Judiciary Act), as amended by later regulations, with the Parliament of the Czech Republic as a party to the proceedings, as follows:

1. The provisions of § 50 para. 1 let. f), let. g), para. 3 and para. 4, § 51 para. 1 let. f), let. g), para. 3 and para. 4, § 52 para. 1 let. f), let. g), para. 3 and para. 4, § 53 para. 1 let. e), para. 3 and para. 4, § 71 para. 4, § 72 para. 2 last sentence, § 82 para. 2 second sentence, § 94 let. d), § 123 para. 3 a para. 4, § 124 para. 4, § 125 para. 3, § 126 para. 3, § 127 para. 3, § 130 para. 2 the words "assignment of judges", § 131 para. 1 let. a), let. b), § 132 para. 1 let. a), let. b), para. 2 the words "of judges and" and para. 3, § 134 – 163, § 185, § 187 the words "3 attorneys for members of the Council for Professional Qualifications of Judges and their 3 alternates and" and § 188 of Act No. 6/2002 Coll., on the Courts, Judges, Lay Judges and the State Administration of the Courts and Amending Certain Other Acts (the Judiciary Act), as amended by later regulations, are annulled as of the day this decision is published in the Collection of Laws.

2. The provisions of § 15 para. 2 second sentence, § 26 para. 2 second sentence, § 30 para. 2 second sentence, § 34 para. 2 second sentence, § 68 para. 1 the words "to the ministry or" , § 74 para. 3, § 99 para. 1 let. c) the words "to the ministry or", § 106 para. 1, § 119 para. 2 and para. 3, § 120, § 121, § 124 para. 1, para. 2 and para 3, § 125 para. 1, para. 2 and para 4, § 126 para. 1, para. 2 and para 4, § 127 para. 1, para.

2 and para. 4, § 128 of Act No. 6/2002 Coll., on the Courts, Judges, Lay Judges and the State Administration of the Courts and Amending Certain Other Acts (the Judiciary Act), as amended by later regulations, are annulled as of 1 July 2003.

REASONING

On 1 March 2002 The Constitutional Court received a petition from the President of the Republic to annul certain provisions of Act No. 6/2002 Coll., on the Courts, Judges, Lay Judges and the State Administration of the Courts and Amending Certain Other Acts (the Judiciary Act), (further also the "Act"). In the reasons in the first part of his petition the President focuses on § 134 – 163 of the Act, (and connected provisions), which introduce the new institution of mandatory periodic evaluation of professional qualifications with the consequence of possible termination of the judge's mandate. In his opinion these provisions are in direct conflict with Art. 1 of the Constitution of the Czech Republic (the "Constitution"), under which the Czech Republic is a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of the citizen, as he is convinced that the basic attributes of a state governed by the rule of law unquestionably include the principle of separation of powers. He also sees these provisions as being in conflict with Art. 82 para. 1 and para. 2 and with Art. 93 of the Constitution. A judge is appointed to his office by the President of the Republic without time limitation, if he meets the basic constitutional and other statutory prerequisites, including professional qualifications. A judge cannot thereafter be removed against his will, with the exception of removal based on a decision of the disciplinary panel. When they established the exception to the non-removability of a judge in Art. 82 para. 2, the framers of the Constitution had in mind conduct of at least the same intensity, as disciplinary violation. Only serious illegal conduct could be considered as such conduct. This guarantees the courts' independence from the legislative and executive branches. However, the Act permits the constitutional office of a judge to be endangered by the results of subsequent evaluation of his professional qualifications, without which he could not even be appointed to the office. Disciplinary proceedings are a sufficient means of protection to prevent the office of a judge from being held by a person who does not adequately see to his professional level, which becomes apparent during his decision-making activities. In this regard, the petition points to the judge's duty to consistently educate himself and deepen his professional knowledge for the proper exercise of the office (§ 82 para. 2 of the Act), and breach of this duty may be a disciplinary violation, for which a judge may be removed from his office. However, breach of this duty must be specific, its effects must be manifested in the judge's decision-making activities, and thus its intensity must endanger confidence in the courts' independent, impartial, and just decision-making (§ 87). A causal relationship between such breach of duty and its consequence (endangering confidence) must be proved in the disciplinary proceedings. Moreover, while disciplinary proceedings have a range of sanctions, graduated according to the gravity of the violation, the evaluation of professional qualification has only one sanction, loss of the office.

The proceedings newly introduced by the Act – evaluation of the professional qualification of judges – will be done on a blanket basis with all judges. Only within the proceedings will determinations begin to be made, whether the prerequisites exist to make it possible to

say that a judge is professionally (un)qualified. This (un)qualification will be evaluated on the basis of abstract, vaguely formulated aspects not related to the judge's decision-making activities (§ 136). The Act thus presumes a causal connection between negative evaluation and a judge's decision-making activities. In other words, statements on inadequate ability to organize the activities of the judicial department and minimal publication, research and pedagogical activity is automatically tied to a judge's decision-making activities and can lead to termination of the judge's office. If we take as a starting point an act which makes court chairmen bodies of state administration of courts, i.e. part of the executive power, this gives the state administration of courts the jurisdiction to evaluate a judge's professional qualification. Thus, the executive power can initiate proceedings against a judge to review his professional qualifications with the consequence of possible termination of a constitutionally guaranteed mandate unlimited in time, without the grounds for this initiation being the judge's decision-making activities. The President's objections are also aimed against interference in the principle of separation of powers, which is presumed by the Constitution. In his opinion, this principle is violated, among other things, by the scope of powers of the Minister of Justice in the area of evaluating a judge's professional qualifications, which he goes on to enumerate, concluding that this scope gives the executive power disproportionately wide power, which enables it to influence the decision-making of judges.

In the reasons of the second part of his petition, aimed at those provisions in which the Act entrusts state administration of courts in the stated scope to the chairmen and deputy chairmen of the courts, who are also judges, the President claims they are in conflict with Art. 82 para. 3 of the Constitution, which provides the incompatibility of the office of a judge with any office in public administration. He states that it follows from certain activities and from the manner of appointing and removing chairmen and deputy chairmen of courts that these are offices in public administrations, and the chairmen and deputy chairmen of courts thus partially become components of the executive power. Such serious concerns about the endangerment of their independence in performing judicial activities are possible, particularly if their remaining in the office of chairman and vice chairman depends on a decision by a representative of the executive power. He points to § 106 para. 1 of the Act, under which the chairmen and deputy chairmen of courts may be removed from their offices if they do not duly fulfill their duties. In his opinion, this condition for removal is expressed very generally, and can lead to arbitrariness by the executive power in removing representatives of the judicial power. As the President states further, he is aware that in some European states state administration of courts is performed by court chairmen from the ranks of the judges. However, our Constitution does not permit combining the office of a judge with the exercise of any office in public administration, and it is up to the constitutional framers whether to permit combining these offices. The Constitution, Art. 82 para 3, expressly names activities which are incompatible with the office of a judge. At the same time, it permits the circle of incompatible activities to be expanded further by statute. However, § 74 para. 3 of the Act circumvents the circle of incompatible activities expressly banned by the Constitution by removing the offices stated in it from the regime of this ban (with the help of a legal fiction). In that case the Constitution is defined through the use of the Act. However, a legal norm of lesser legal force, i.e. in this case the Act, may not eliminate the circle of activities given by a legal norm of greater legal force – the Constitution. In the conclusion of this part of the petition, the President then also contests the possibility of temporary assignment of a judge to the

Ministry, which he also considers incompatible with the principle of separation of powers and with the purpose of the office of a judge.

The President considers another contested provision, § 160 para. 3 of the Act, which provides that Supreme Court proceedings in matters of evaluating the professional qualifications of judges are non-public, to be in conflict with Art. 96 para. 2 of the Constitution, Art. 38 para. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter") and Art. 6 para. l of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), which enshrines the principle of public proceedings. He believes that there are no grounds for breaching the principle of public proceedings in proceedings before the Supreme Court, whose decision is a decision on the merits of the matter and is final. Its decision will have fundamental effects on the life of the individual in question. Art. 6 para. 1 of the Convention provides conditions for possible exclusion of the public from proceedings. However, none of these conditions has been met in the contested provision. Thus, the Act restricts the element of public control of the conduct of court proceedings in conflict with the Convention.

In the last part of the grounds for the petition, aimed at provisions concerning the Judicial Academy, the President, with repeated emphasis on Art. 1 of the Constitution, the principle of separation of powers, as well as on the constitutionally guaranteed independence of courts and judges (Art. 81 and Art. 82 para. 1 of the Constitution) expresses the conviction that independence from the executive power must be found not only in the courts' decision-making activities in the narrow sense of the word, but in the overall ability of the executive power to influence the decision-making activities of judges. A judge bears responsibility for his professional level and is required to consistently educated himself and deepen his professional knowledge for the proper exercise of his office (§ 82). However, it should be only up to him how he achieves this. It is difficult to combine judges being mandatorily educated in an institution whose composition and educational content is directly or indirectly in the hands of the executive power with the principle of separation of powers and the independent exercise of the judiciary. The Supreme Court's ability to provide this education in a comparable scope is unrealistic, in view of the Supreme Court's current personnel, budget and technical capacity. Thus, the life-long mandatory education of judges in practice comes under the control of the executive power. The President makes clear in the petition that, although he considers it correct for the Ministry of Justice to make education possible for judges, and therefore it is appropriate to establish the Judicial Academy, nonetheless in his opinion it is unthinkable for judges to be required to participate in training at set intervals precisely, and de facto exclusively, in this institution.

In conclusion the President then summarizes that in a state governed by the principles of the rule of law, the separation of state powers must be based on a system of checks and balances, but the legal regulation in question violates this system, through a disproportionate influence of the executive power over the judicial power. The task of the executive power, in the intentions of the Constitution, is to ensure operation of the judiciary in material terms, court administration personnel, preparation of future judges for the exercise of their offices, and ensuring adequate numbers of them. However, the Act does not observe the balancing of powers and the degree of influence by the executive power over the judicial power can, in his opinion, endanger the independence of the

judiciary as one of the pillars of a democratic state governed by the rule of law. Therefore, he proposes a finding which will annul these provisions of the Act on Courts and Judges: § 15 para. 2 second sentence, § 26 para 2 second sentence, § 30 para 2 second sentence, § 34 para. 2 second sentence, § 50 para 1 let. f) and let. g), para. 3 and para. 4, § 51 para. 1 let. f) and let. g), para. 3 and para. 4, § 52 para. 1 let. f) and let. g), para. 3 and para. 4, § 53 para. 1 let. e), para. 3 and para. 4, § 68 para. 1 the words "to the Ministry or", § 71 para 4, § 72 para. 2 last sentence, § 74 para. 3, § 82 para. 2 second sentence, § 94 let. d), § 99 para. 1 let. c) the words "to the Ministry or", § 106 para. 1, § 119 para. 2 and para. 3, § 120, § 121, § 123 para. 3 and para. 4, § 125, § 126, § 127, § 128, § 130 para. 2 the words "assignment of judges" , § 131 para. 1 let. a), let. b), § 132 para. 1 let. a) a let. b), in para. 2 the words "of judges and", para. 3, § 134 to 163, § 185, § 187 the words "3 attorneys for members of the Council for Professional Qualifications of Judges and their 3 alternates and" and § 188, provided that at the same time, in relation to the provisions of § 15 para. 2 second sentence, § 26 para. 2 second sentence, § 30 para. 2 second sentence and § 34 para. 2 second sentence be proposes postponing the legal effect so that Parliament will have sufficient time to pass new legislation.

II.

In accordance with § 69 of Act No. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the Constitutional Court requested position statements from parties to these proceedings – both chambers of the Parliament of the Czech Republic. The Chamber of Deputies and the Senate of the Parliament of the CR provided their positions statements on the amendment of Act No. 6/2002 Coll. on Courts and Judges.

III.

Before it turned to discussing the merits of the petition, the Constitutional Court reviewed, under § 68 para. 2 of Act No. 182/1993 Coll., whether the formal conditions for passing a law have been met and whether the contested Act was passed within the constitutionally prescribed limits of the jurisdiction and in a constitutionally prescribed manner. After conducting this review, the Constitutional Court declares that the above-mentioned conditions were met, whereby the prerequisite for the Constitutional Court to be able to review the substance of the filed petition.

IV.

The petition from the President of the Republic to annul certain provisions of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges and Administration of the Courts and Amending Certain Other Acts, in essence applies to a total of three basic areas.

The first group of provisions proposed to be annulled concerns the evaluation of the professional qualifications of judges. It includes, first of all, the entire Part One Chapter III Division Five of the Act on Courts and Judges, which, in § 134 – 163 of the Act, governs the

procedure for evaluating professional qualifications. It provides for periodic evaluation of professional qualifications, the evaluator, the aspects for evaluating professional qualifications, the manner of inspecting a judge's decision making activity by a special panel of a given court in the event of an unsatisfactory evaluation, the composition of the Council for Professional Qualifications of Judges established by the Ministry of Justice, and proceedings before it in cases where the special court panel evaluates the judge's decision making activity as unsatisfactory, and finally proceedings before the Supreme Court on a petition by a party to the proceedings who does not agree with the Council's decision in a matter of professional qualification. In Part One Chapter I Division Two Subdivision Two of the Act, governing the jurisdiction of judicial councils, the provisions of § 50 para. 1 let. f) and g), para. 3 and 4, § 51 para. 1 let. f) and g), para. 3 and 4, § 52 para. 1 let. f) and g), para. 3 and 4 and § 53 para. 1 let. e), para. 3 and 4, which provide judicial councils, within their jurisdiction, tasks relating to evaluating judges' professional qualifications, are proposed to be annulled. In Part One Chapter III Division Three of the Act, governing the jurisdiction of bodies of court administration, the provisions of § 123 para. 3 and 4, § 124 para. 4, § 125 para. 3, § 126 para. 3 and § 127 para. 3, which provide the authorization of the Ministry of Justice and chairmen of individual levels of the court system in evaluating professional qualifications of judges, are proposed to be annulled. Also proposed to be annulled are the provisions of § 71 para. 4 and the last sentence in § 72 para. 2 of the Act, which require taking into consideration the evaluation of judges' professional qualifications when transferring judges to higher level courts, part of § 82 para. 2, which gives a judge the obligation to submit, as provided by statute, to evaluation and assessment of his professional knowledge and awareness and § 94 let. d) of the Act, which provide that a judge's office terminates on the date that a decision which finds him to be professionally unqualified to hold the office goes into legal effect. Finally, in this area the following are proposed to be annulled: provisions on notifying appropriate persons and institutions of the evaluation of results of a judge's professional education by the Judicial Academy (§ 132 para. 3 of the Act on Courts and Judges), transitional provisions, which provide a deadline for evaluating professional qualifications of judges named to their offices before the date when the Act went into effect (§ 185 of the Act), and provisions on nominating attorneys and notaries as members of the Council for the Professional Qualifications of Judges (in § 187 the words "3 attorneys as members of the Council for the Professional Qualifications of Judges and their 3 substitutes and" and § 188 of the Act). The foregoing provisions of the Act on Courts and Judges are proposed to be annulled due to their conflict with Art. 1, Art. 82 para. 1 and 2 and Art. 93 of the Constitution.

In another thematic area, concerning the exercise of state administration of courts, the provisions proposed to be annulled are first of all, from Part One, Chapter I, Division One, Subdivision Four of the Act on Courts and Judges, governing the organization and activities of the courts § 15 para. 2 second sentence, § 26 para. 2 second sentence, § 30 para. 2 second sentence and § 34 para. 2 second sentence, which provide that the chairmen and vice chairmen of the specified individual levels of general courts, in addition to decision-making activity, also perform state administration of the relevant courts in the scope provided by the Act. Further provisions proposed to be annulled, § 119 para. 2 and 3 of the Act, then expressly state that the chairmen and vice chairmen of individual levels of the general courts are bodies of state administration of courts and that chairmen of panels and other judges also take part in it in the scope and under the conditions provided by this Act. The following provisions of § 120 and 121 of the Act on Courts and Judges then provide that

the Ministry of Justice performs state administration of courts either directly or through the chairmen of these courts, who implement it in the scope provided by this Act and who may entrust this performance to the vice chairmen or, as the case may be, chairmen of panels and other judges of the relevant court. Also contested is § 74 para. 3 of the Act which provides that the offices of chairman and vice chairman of a court and certain other enumerated activities are not considered to be office in public administration. Also proposed to be annulled in Part One Chapter III Division Three of the Act on Courts and Judges, governing the jurisdiction of bodies of state administration of courts, are § 124, 125, 126 and 127, which specifically set forth the activities whereby the chairmen of individual levels of general courts exercise state administration, as well as the following § 128 of the Act, governing procedures followed by a body state administration of courts when it finds that a judge is at fault in violating his obligations in the exercise of his office. Another provision proposed to be annulled, § 106 para. 1 of the Act on Courts and Judges provides the possibility of removing a court chairman or vice chairman from his office by the person who appointed him, if he does not duly perform his obligations. Also proposed to be annulled are, in § 68 para. 1 of the Act the words "to the ministry or" and the same words in § 99 para. 1 let. c) of this Act, which make it possible to assign a judge to the Ministry of Justice and which provide for temporary exemption from the exercise of the office of judge in the event of such assignment. The petition claims that the above-mentioned provisions of the Act on Courts and Judges are in conflict with Art. 82 para. 3 of the Constitution.

The last thematic area of provisions of the Act on Courts and Judges proposed to be annulled concerns the mandatory enrollment of judges for professional education in the Judicial Academy. This concerns primarily annulment of the second sentence of the second paragraph of § 82 of the Act on Courts and Judges, which provides a judge's obligation to take part in professional education in the Judicial Academy and submit to evaluation and assessment of his professional knowledge and awareness. In connection with this provision, in Part One, Chapter III, Division Four of the Act on Courts and Judges, governing the establishment, organization and activities of the Judicial Academy, the following are proposed to be annulled: in § 130 para. 2 the words "enrollment of judges" and connected therewith § 131 para. 1 let. a) and b) and § 132 para. 1 let. a) and b), in para. 2 the words "of judges and" and para. 3. These provisions provide further detail on a judge's obligation to take part in professional education in the Judicial Academy by providing the length of study, the manner of completion and notification of the evaluation of results of a judge's professional education. The petition claims that these contested statutory provisions are in conflict with Art. 1, Art. 81 and Art. 82 para. 1 of the Constitution.

V.

In the preamble to the Constitution and its Art. 1, in the introductory declaration to the Charter, as well as in international treaties under Art. 10 of the Constitution, the Czech Republic subscribes to the time-tested principles of a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens (Art. 1 of the Constitution) and on democratic values (Art. 2 para. 1 of the Charter). In this state, under Art. 2 para. 1 of the Constitution the people are the source of all state authority,

and exercise it through the legislative, executive and judicial bodies. One can conclude, just from this introductory statement that the very foundation of our constitutional system enshrines the principle of separation of state power, a principle, derived from the idea that human nature has a tendency to concentrate power and misuse it, which has become a guarantee against arbitrariness and misuse of state power and basically also a guarantee of freedom and protection of the individual, a principle which is the result and reflection of historic, intellectual and institutional development until now, which, in the modern age for example, involved such distinctive people as John Locke and Charles Montesquieu, and institutions such as the British Parliament and the British judiciary. It is not the task of the Constitutional Court, in a situation which can be considered given, to concern itself more closely with the development and causes of this principle. Nevertheless, it considers it necessary to briefly state that the very foundations of this principle contain the conviction, based on empirical experience, that human thought and social events could never be ascribed a solely rational nature, as they also contained evident irrational elements, and moreover, rationality of thought has never fully coincided with rationality of behavior. As an expression of the existing condition, "government by all" is a mere ideological formula, often hiding a completely contrary social situation. In a social situation characterized by the internal and external inadequacy of the individual and the entire society, basic human needs can be satisfied, and at the same time at least the direction toward the goal of democracy maintained, only by the path of conflict-based balancing of individual interests. Thus, although even a democratic state does not strive for maximalistic programs in the area of the judiciary, and is therefore quite far from the idea of a "judicial state" – the bodies of state power include, as already stated, the legislative and executive power, and therefore this state power can be functionally implemented in a democratic system only on condition that all its bodies function – on the other hand it is required to create institutional prerequisites for what is, as far as the judiciary is concerned, characteristic and unconditional, i.e. the formation and establishment of true independence of the courts, as an important state-creating, but also polemical element, not only for the stabilization of their position but of the entire democratic system, in relation to the legislative and executive branches. This true independence of the courts is a characteristic and indispensable attribute of the judicial power, justified and also required by Art. 4 of the Constitution, under which the fundamental rights and freedoms enjoy the protection of the judicial bodies, as well as by Art. 81 and Art. 82 of the Constitution, under which the judicial power is exercised in the name of the Republic by independent courts, and judges are independent in the exercise of their duties and no one may endanger their impartiality. Therefore, this characteristic feature and content of the judicial power cannot be cast in doubt, and therefore even its basic functions are not compatible with any manner of infiltration by any other state power, which premise was expressed in the Constitutional Document of the Czechoslovak Republic introduced by Act No. 121/1920 Coll. by § 96 para. 1, under which the judiciary is separate from administration in all instances, and in the current Constitution in Art. 82 para. 3, under which the office of a judge is incompatible with the office of the President of the Republic, a member of Parliament, or any office in public administration. Thus, the principle of judicial independence is, in this regard, of an unconditional nature which rules out the possibility of interference by the executive power. However, the contested legal regulation does not meet this requirement.

In his petition, the President of the Republic contests first of all, provisions of the Act relating to the periodic evaluation and assessment of the professional qualifications of all judges, including provisions which complement them. Specifically, these are § 134 to 163 (chapter III division five – evaluation of the professional qualifications of judges) and in connection with them § 50 para. 1 let. f) and let. g), para. 3 and para. 4, § 51 para. 1 let. f) and let. g), para. 3 and para. 4, § 52 para. 1 let. f) and let. g), para. 3 and para. 4, § 53 para. 1 let. e), para. 3 and para. 4, § 71 para. 4, § 72 para. 2 in the last sentence, § 74 para. 3 in the words "in the Council and", § 82 para. 2 in the second sentence, § 94 let. d), § 123 para. 3 and para. 4, § 124 para. 4, § 125 para. 3, § 126 para. 3, § 127 para. 3, § 132 para. 3, § 185, § 187 in the words "3 attorneys for the Council for Professional Qualifications of Judges and their 3 alternates and" and § 188.

To evaluate the justification of this part of the petition, it is necessary to provide an overview of these individual provisions, through which, within the institution of evaluation of professional qualifications of judges, the law provides authorization to individual court administration bodies.

Under the regulations expressed in the contested provisions, the predominant part of which is included in Part One Chapter III of the Act, titled (which in the given context is not without significance) state administration of courts, the professional qualifications of judges, who are required to submit to the statutorily specified manner of evaluation and assessment of the professional knowledge and awareness (§ 82 para. 2), are monitored by the Ministry of Justice (§ 123 para. 3). For this purpose it directs the methods of evaluating professional qualifications of judges and directs the methods of inspecting their decision-making activity (§ 123 para. 3). It establishes the appropriate Councils for evaluating the professional qualifications of judges [a Council for criminal law, a Council for civil law, and a Council for the administrative judiciary (§ 123 para. 4)]. The chairmen of the Supreme Court, High, Regional and District Courts, as holders of offices in the state administration of courts, to which they are appointed (except the chairman and vice-chairman of the Supreme Court) by the Minister of Justice, who has the authority to remove them on the basis of the generally, quite vaguely formulated grounds "due failure to fulfill obligations" (§ 103 para. 1, § 104 para. 1, § 105 para. 1, § 106 para. 1), exercise the enumerated jurisdictions in relation to the evaluation of the professional qualifications of judges (§ 124 para. 4, § 125 para. 3, § 126 para. 3, § 127 para. 3) and these chairmen, except the chairmen of District Courts, also evaluate these qualifications (§ 135). The aspects from whose angles the professional qualifications of a judge are evaluated are reviewed, among other things, on the basis of an evaluation prepared by the relevant court chairman and a report on the results of a judge's professional education prepared by the Judicial Academy (§ 136 para. 2), directed by a director appointed again by the Ministry of Justice. The members of a special panel which inspects a judge's decision-making activities are appointed from among the ranks of judges by the relevant court chairman (§ 137 para. 2), who (in cases of a judge receiving an inadequate grade from a special panel or if he himself does not agree with the special panel's decision, in which the judge's decision-making activity is graded as adequate) also submits a petition for the judge's professional qualifications to be evaluated by the Council which reviews and decides on this petition; this Council is established by the Ministry (§ 138, § 139 para. 1) and some of its members and alternates from among state prosecutors, attorneys, notaries and experts in the fields of criminal, civil and administrative law are appointed, on the proposal of the relevant

bodies, by the Minister (§ 139 para. 8). The Council may hold proceedings and make decisions if at least 7 members or alternates are present and the consent of a majority of members or alternates present is necessary to make a decision (§ 141 para. 2), from which it is clear that decisions, in view of the composition of any individual Council (§ 139 para. 4, para. 5, para. 6) can also be made by members none of whom is a judge. In this regard it must be noted that the very fact that persons from among attorneys, state prosecutors and notaries can be members in this body and thus make decisions concerning a judge's future appears highly problematic, in view of their possible motivation, arising from their status as a party or representative in proceedings before a court. Proceedings before a Council are opened on a petition submitted by the relevant court chairman (§ 144), who is (in addition to the judge whose professional qualifications are at issue) a party to the proceedings in questions, as is the Minister of Justice (§ 145 para. 1). If any of these parties disagrees with the Council's decision, he may file a petition for evaluation of the judge's professional qualifications with the Supreme Court (§ 153), and is a party to the resulting proceedings (§ 157), which terminate in a decision by the Supreme Court.

In the opinion of the Constitutional Court, the very enumeration of the individual powers of bodies of the executive branch (which are themselves in relationships of superiority and subordination) gives rise to a disproportionate opportunity for interference by the executive into the judicial power. The powers of representatives of the executive branch, conceived so widely and multilaterally, in relation to the evaluation of professional qualifications of judges who have already been appointed, in their cumulative effect do not observe the principle of separation of powers and in light of the above-mentioned constitutional values they cannot be accepted. Through them, the executive power, which, in relation to the judicial power, is supposed to only create material and organizational prerequisites for its proper functioning, acquires instruments which are capable, even if only indirectly, of influencing the independent decision-making of judges. The fact that the final decision on professional qualifications is in the hands of a panel of the Supreme Court cannot fundamentally change anything in this conclusion on the disproportionate opportunity for the executive power to interfere in the judicial power, likewise the fact that input to the evaluation of judges is also given by the judges' councils newly established by the Act, elected from among the judges at individual courts, as they have only advisory votes, which the representatives of the executive power are not required to accept. In this regard, it must also be emphasized that under the Act the judicial councils do not have an umbrella body which could be a true representative of the judicial power and a partner for the Ministry of Justice as a central body of state administration, or, as the case may be, itself bear responsibility for proceedings and the exercise of court administration, as well as responsibility for the quality of judicial personnel.

Art. 81 of the Constitution, already cited, provides that the judicial power is exercised in the name of the Republic by independent courts. Art. 82 para. 1 of the Constitution provides that judges are independent in the exercise of their offices, and no one may endanger their impartiality. Thus, the independence of a judge and the independence of the judicial power are related, and are in a relationship of being mutually conditional, also with the impartiality of a judge and the court. Independence and impartiality are inseparable attributes of the concept of a court. Its impartiality and independence are a value which benefits everyone, as it is one of the guarantees of equality and legal certainty in a democratic society. Only an impartial court is capable of providing true

justice always and to all, and one of the means guaranteeing the impartiality of a court is the independence of judges. The Constitutional Court has already considered the principle of judicial independence in a number of its decisions, for example in the matters under file nos. Pl. US 13/99 (Collection of Judgments of the Constitutional Court, vol. 15, pp. 191 – 202), Pl. US 18/99 (vol. 19, pp. 3 – 21), Pl. US 41/2000 (vol. 21, pp. 493 – 500), in which it emphasized the importance of their guarantees as a basic prerequisite for fulfilling the constitutional status of the judicial power, as a separate, individual form of the exercise of state power. The purpose of these guarantees is to ensure that a judge has the status which is required by his role in the process of impartial, just decision-making by a court, in which the judge is, under his oath, bound only by the legal order and his best knowledge and conscience (naturally constantly juxtaposed with the fundamental values attached to human beings and justice). Thus, everyone may legitimately, in accordance with Art. 6 of the Convention, expect independence and impartiality from the judiciary and from every judge to whom the protection of his rights is entrusted. Under the cited norm, the requirement of "an independent and impartial court established by law" has also been developed in the case law of the European Court of Human Rights so that, to fulfill the condition of independence, it is essential that the court can base its decisions on its own free opinion of facts and their legal aspect, without having any obligation whatsoever toward the parties and public bodies, and without its decision being subject to review by another organ which would not also be independent in that sense. In this regard, we can also mention independent documents which emphasize the independence of the judicial power and judges, such as the Fundamental Principles of the Independence of the Judicial Power, passed by the UN in 1985, and the positions of the Council of Europe on the judiciary, which are formulated in the Recommendation of the Committee of the Ministers of the Council of Europe No. 12 of 1994, emphasizing the necessity of a judge's independence in the process of decision-making for acting without any restriction, inappropriate influence, external motivations, pressures, threats or interference, direct or indirect, from any direction and for any reason, and emphasizing as regards the executive and legislative powers, the need for creating and strengthening the guarantees of the independence of courts. In our Constitution these guarantees include, in addition to the principle of the incompatibility of offices, the absence of time limits on the office of a judge (Art. 93 para. 1 of the Constitution), non-transferrability and non-removability, as enshrined in Art. 82 para. 2, para. 3 of the Constitution. Para. 2 of this provision provides that a judge cannot be removed or transferred to another court against his will; exceptions due to disciplinary responsibility are provided by statute. In this regard it must be said that a certain amount of room, which the framers of the Constitution provided in this provision by using the term "in particular", precisely because it is used in relation to an exception, must be interpreted in a strictly restrictive manner, in accordance with the usual legal principle on the relationship between a rule and an exception. Thus, we can fully agree with the petition that exceptions to the rule of non-removability of judges can apply only to conduct which is, in its intensity, comparable with the disciplinary violation expressly cited by the Constitution. An example of such conduct is another reason provided by the Act for the termination of a judge's office, conviction of an intentional crime or conviction with a prison sentence for a crime of negligence; however, an evaluation of a judge's professional qualifications as inadequate, influenced, moreover, as emphasized above, in substantial part by the executive power, cannot be of such character.

We must undoubtedly agree that a judge's professional qualifications, in addition to his moral integrity, are an undoubted prerequisite for the due performance of his office, and therefore exceptional emphasis must be laid on them. However, the emphasis must be attached primarily to preparation for this profession. The act appointing a judge to his office without limitation in time, must, however, be done in the conviction that the candidate will hold up in all areas – also fundamentally from the perspective of a substantial part of the aspects cited for evaluation of the professional qualifications of judges in § 136 para. 1 of the Act. Thus, it is precisely in the process preceding a judge's appointment to his office that all possible requirements imposed on a judge should be concentrated, and it is precisely here that the evaluation of professional qualifications must be subject to the strictest criteria, thus ruling out at the very beginning the possibility of appointing as a judge a person with insufficient professional qualifications or a person lacking guarantees of further self-education (even at the possible cost of exchanging the current practice for one which would permit the appointment only of a person whose moral, human and professional qualities had already been verified by the results of his previous profession). However, at the moment of appointment such a person becomes a judge, and thus an essential attribute of that office, appearing in the form of a judge's independence, is also activated. During the decision-making process the judge then not only must be independent and impartial, but should also be objectively perceived as such by the public. For this reason too the Constitutional Court considers the evaluated mechanism of subsequent and repeated evaluation of a judge's professional qualifications, which may lead as far as his removal, to stand in conflict with constitutional guarantees of judicial independence. It appears so because the judge who is exposed to such evaluation – the methods of which are, moreover, directed by a body of the executive power – is one whose qualifications, including professional ones, to perform this office have already received state approbation. In connection with the foregoing, one cannot overlook the possible effect of appeals on the grounds cited on legal certainty in general, in relation to those court decisions which have previously been issued by a judge thus removed due to lack of qualifications.

Although the aim pursued by a legal regulation seeking to achieve a qualitatively higher level of judicial personnel is legitimate, the chosen means aimed at it, as it is constructed in the contested provisions, must be evaluated as not observing fundamental constitutional principles. Moreover, it must be taken into consideration that the Act, in connection with the judges' responsibility for their professional qualifications in the performance of their offices declared in it (§ 82 para. 1), also expressly included, among the obligations it imposed on judges, the obligation to consistently educate themselves and deepen their professional knowledge for the proper exercise of their office (§ 82 para. 2), as well as the obligation to fulfill that obligation in accordance with the interest in the due exercise of the judiciary, and if the judge causes violation of his obligation this is a disciplinary violation (§ 87) for which the judge also bears disciplinary responsibility (§ 86), which may even lead to his removal [§ 88 para. 1 let. d)]. Thus, it can be said that to reach a situation where persons who ignore the obligation to take care of their professional level are excluded from the judicial personnel, the Act makes use of means which are – such as the exception from the principle of non-removability – expressly presumed by the Constitution.

The Constitutional Court is also convinced that the contested mechanism for reviewing the professional qualifications of judges as it is regulated by the Act must be rejected and

considered unconstitutional on the grounds that it violates the principle of separation of powers and the related principle of judicial independence. This, as already stated above, is of an unconditional nature, ruling out the possibility of such intervention by the executive power as is represented by a disproportionate role in reviewing the professional qualifications of judges. For these reasons the Constitutional Court granted the petition of the President of the Republic and annulled all provisions of the Act on Courts and Judges concerning evaluation of the professional qualifications of judges as they are enumerated in the introduction to this part, due to their conflict with Art. 1, Art. 2 para. 1, Art. 81, Art. 82 para. 1, para. 2, and Art. 93 of the Constitution, without it being necessary to separately consider or evaluate the constitutionality of § 160 of the Act, as the institution of evaluation of the professional qualifications of judges must be annulled, in view of the interconnectedness of individual levels at which the evaluation is performed, as a whole, including those parts of the provisions which concern that institution.

The Constitutional Court then drew on the principles of separation of powers, independence of the judicial power, and the independence of judges, and following on what has already been stated concerning these concepts, also evaluated provisions contested by another part of the President's petition, relating to the obligations set by them on judges to periodically complete training in the Judicial Academy (§ 82 para. 2 second sentence). This is established by the Act as an organization component of the state (§ 129 para. 1), whose activities are supervised by the Ministry of Justice (§ 130 para. 4). It is directed by a director appointed and removed by the Minister of Justice, and the content of the education activity, enrollment of judges and study programs are set by the Council of the Judicial Academy, again appointed by the Minister of Justice (§ 130 para. 2), whom, also on the proposal of the director of the Judicial Academy, appoints and removes teachers working at the Academy (§ 133). It follows from this that it is again primarily the executive power, represented by the Minister of Justice, to which the Act provides authorization to determine a manner of education for all judges, as, even if the Act also permits professional education through the Supreme Court (§ 129 para. 3), the assumption that the Supreme Court could do this, given its current decision-making and other activities, in the scope presumed by the Act for all judges in the time limits set by (§ 131 and 132 of the Act), is unrealistic. The situation arising from the legal regulation as analyzed above, where the manner of education, including setting its content, remains de facto in the hands of the executive power, cannot be accepted, as it is another expression of the principle of the separation of powers, a disproportionate and impermissible influence by the executive power on the judicial power. In view of the nature of power, it cannot simply be presumed that the executive power, given the existence of authorization provided to it by the Act, will exercise this authorization in a self-limiting and restrained manner. In this regard it is necessary to point repeatedly to the fact that the task of the judicial power is, through judicial independence as a prerequisite for its due exercise, to protect the rights of citizens, including from the arbitrariness or unauthorized interference of the state, i.e. including the executive power. The possibility of influencing the nature of this protection, even in a manner which externally appears to be clothed in the requirement of properly ensuring professional qualifications of judges, could, in the situation constructed by the Act, lead, on the contrary, to restriction of the thus-understood independence. The described system of education, de facto directed from the center of the executive power, does not provide the necessary prerequisite for independent and free formation of opinion, that of the widest possible openness with a

possibility for confrontation of different opinions from various sources (the choice of which should be left to the autonomous decision of the judge himself), including foreign sources. Such a system then, in connection with the statutorily provided manner of completing education and in relation to judges, through the final thesis (§ 132 para. 2), which is subject to evaluation (the result of which will thus apparently, by the nature of the manner, also be conditioned by the judge's acceptance of opinions presented in the Academy), and this is then one of the documents in the evaluation of a judge's professional qualifications, may evoke a feeling of dependence and lead to other undesirable results, such as loss of a sense of one's own responsibility in the decision-making process itself.

In this context it is necessary to respond more closely to the position statement from the Chamber of Deputies, emphasizing the passage of the contested Act by the need for new reform, the aim of which is a speedy, just and unitary judiciary, which, however, lacks a deeper immersion into the problem of unity and uniformity and also betrays the lack of clarity in the nature and function of social phenomena and institutions in general. A closer analysis of any social phenomenon points to the presence of antithetical forces functioning in it and creating a tension between both these correlated elements, a tension which is an indispensable condition for social development. The principle of polarity which operates in social events thus also creates tension, in addition to a range of other forms, between the search for unity and variety. From this base of ideas comes democracy, which, although it regards this fact as a difficult and problematic reality, nevertheless also sees it as the most serious barrier to a dysfunctional uniformity. Therefore "real" unity can be achieved only through the conflict of various aspects, relating to particular areas, some of which aim toward unity, while others aim toward variety. The source of true unity must therefore be sought first of all in conflict, as it is only through the effects of a great number of often markedly diverging opinions and attitudes that each person also acquires an awareness of social congruence and unity.

Brought into very close relation with the matter at issue, the requirement of a unitary judiciary must be considered problematic in the directions identified, both in its aspect of unitary education and in the aspect of unitary decision-making. Any unity may fulfill a positive social function only if those who aim toward it are also capable of differentiating themselves so that they can thereby more meaningfully and effectively unite. Judicial unity not conditioned by anything would, on the contrary, lead to undesirable effects on conditions in which each individual judge would be ordered to accept further education from a source determined by the state and under pressure from a hypertrophy of unifying every detail would be deprived of conditions for just evaluation of each individual case by respecting its uniqueness. A mechanical assumption of what had already been "unified" would thus lead not only to an undesirable model, but would endanger the very development of legal thought. Therefore, in the situation of the judiciary one can accept the creation of a relatively unitary opinion only within a framework given by procedural steps which themselves do not rule out the conflict of various opinions.

Ensuring a foreseeability of decision-making in courts which complies with legal certainty and respect for the laws (Art. 1 of the Constitution) is a task primarily for the preparation of future judges, and within that preparation, finding suitable methods capable of ensuring that standard procedures are embraced in standard situations and verifying knowledge of

not only legal regulations but also case law. The primary task of the latter is to give direction to the interpretation of regulations within the intentions of constitutional principles, and it is the responsibility of the judges themselves not only to know the case law, but also, to develop and create it in a manner responding adequately to the changing social reality.

It is undisputed that the continuing professional education of judges is expected of the profession. This postulate also arises from the cited international documents. As stated earlier in another context, it is an obligation also imposed by this Act in § 82 para. 2, and the Act also provides that a judge is responsible for his professional level. However, this responsibility, and this must be emphasized, arises primarily from the very foundation of judicial independence, with which it must necessarily be connected, and from which also arises the commitment of each individual judge not only to just and impartial decision-making but also foreseeable decision-making, built on thorough knowledge of legal regulations and case law, as what is typical for the attribute of judicial independence and also necessary in the interest of the functioning of a democratic system is precisely the natural connection of this attribute with judicial responsibility, arising also from Art. 90 and Art. 95 of the Constitution and expressed in detail, for example, in Art. 6 para. 1 of the Convention, imposing on a judge the obligation corresponding to the right of each person to have his matter justly, publicly and in an appropriate time, handled by an independent and impartial court. The responsibility and guarantee for this commitment, however, must be borne by the judicial power itself.

Thus, we can conclude that the very establishment of the Judicial Academy by the Act has its justification in view of the role which it is to fulfill in the education of trainee judges and other court employees; in relation to continuing education of judges, however, it can be seen, with regard to what was stated above, only as one of the possible sources, chosen freely by the judge himself. Therefore, for the cited reasons, the Constitutional Court annulled all the provisions of the Act which impose the obligation of education of judges in the Judicial Academy, as well as provisions related to them in content, concern the scope of that obligation.

The last circle of provisions contested by the petition [§ 15 para. 2 second sentence, § 26 para. 2 second sentence, § 30 para. 2 second sentence, § 34 para. 2 second sentence, § 68 para. 1 in the words “to the Ministry or” , § 74 para. 3, § 99 para. 1 let. c) in the words “to the Ministry or”, § 106 para. 1, § 119 para. 2 and para. 3, § 120, § 121, § 124 to 128] basically concern the regulations governing the manner of exercising state administration of courts. In evaluating this part of the petition the Constitutional Court had to take into consideration that the petition from the President of the Republic, by whose requested judgment the Constitutional Court is bound, did not contest the position of the Ministry of Justice as the central body of state administration of courts, and likewise, with some exceptions, did not contest the jurisdiction of that body.

In evaluating the cited provisions, § 74 para. 3 of the Act is of key significance, which states that offices in public administration are not considered to include the office of chairman and vice-chairman of a court, temporary assignment to the Ministry, members in a Council and the council for professional qualifications of state prosecutors, membership in advisory bodies to the Ministry, the government and bodies of the chambers of Parliament. For evaluating the content of article 82 para. 3 of the Constitution is decisive,

which states that the office of a judge is not compatible with the office of President of the Republic, a member of Parliament or any other office in public administration; a statute shall provide other activities with which the exercise of the office of a judge is incompatible. Thus, the Constitution provides which offices are fundamentally incompatible with the office of a judge; its first sentence must be understood as a demonstrative list, whose limitations can, in accordance with the second sentence after the semi-colon, be expanded, but not narrowed, as § 74 para. 3 of the Act does. The legislature, thus authorized to expand the cited list, but not to restrict it, can not change the will of the framers of the Constitution by issuing a legal norm addressing this matter and thus not having its constitutional basis in it. Thus, if the Constitution, as the norm of the highest legal force, sets a rule that the office of a judge is incompatible with any office in public administration, which activity must undoubtedly be considered to substantially include the activities named in related provisions, which are performed by chairmen and vice-chairmen of courts (which are, in any case, expressly identified as bodies of state administration by § 119 para. 2, para. 3), then one cannot conclude otherwise than that the cited provision is in conflict with Art. 82 para. 3 of the Constitution, and in connection with it, also all others arising from it, which further regulate the office of chairmen and vice-chairmen of courts and their activities. Here, however, it must be emphasized that the Constitutional Court annulled these provisions solely due to the cited formal reasons, and that by derogation of § 74 para. 3 of the Act it did not intend to indicate that the direction and administration of courts should be entrusted to persons other than those from among the ranks of judges.

The principle of incompatibility of offices, expressed in the above-cited article of the Constitution, may not be violated even by an act permitting judges to function in bodies of the executive power, or the legislative power, as is then done by the contested § 74 para. 3 of the Act. The cited principle of incompatibility of offices is one of the other guarantees of judicial independence. As a constitutional principle, it must be strictly observed, and cannot be circumvented by arrangements such as are contained in § 99 para. 1 let. c) of the Act, under which a judge, while working – expressly solely at the Ministry – temporarily relieved of the exercise of his office. An immanent feature of this office is its continuity. Membership in advisory bodies to the Ministry, the government and both chambers of Parliament certainly includes the relevant fulfillment of the tasks of these separate components of the state power and the working of judges in these bodies is thus in conflict with the principle of separation of powers, not to mention the fact that personal and extra-judicial connections which arise during such activity unavoidably increase the probability of a possible conflict of interest and thus make impartiality in the form of judges' lack of bias subject to doubt.

Thus, the Constitutional Court, for the cited reasons, due to conflict with Art. 82 para. 3 of the Constitution, annulled § 74 para. 3, as well as all the other provisions which arise from it, relate to it in content or structure, as they are cited above. Moreover, it must be added that the Constitutional Court was led to annul § 106 para. 1, in addition to the reasons already stated, by another reason, the quite general and non-specific – not corresponding to the principle of legal certainty – expression of reasons leading to the removal of chairmen and vice-chairmen of courts. In this regard the Constitutional Court considers it necessary to note that the offices of chairmen and vice-chairman of courts should be considered an advancement in a judge's career (similar to the appointment of a panel

chairman), and therefore the chairman and vice-chairman of a court should also not be subject to removal otherwise than for a reason foreseen by statute and by proceedings in disciplinary proceedings, i.e. by a court decision. A structure where the chairmen and vice-chairmen of courts also perform activities which are administrative in nature, without, however, losing the quality of the office of an independent judge, and only due to that find themselves in the position of a state employee, whose defining feature is a subordinate relationship and the following of orders from superiors in employment, is considered in a number of developed European countries (e.g. Austria, Germany, Sweden, Norway, the Netherlands, Great Britain, Ireland, Italy, Portugal) an integral component of the principle of separation of powers, flowing from the requirements of a state governed by the rule of law and the derived principle of institutional independence of the judiciary, as well as from the principle of undisturbed exercise of the personal, independent judge's mandate. The Constitutional Court also adds that the current situation, where the central body of state administration of courts is the Ministry of Justice, and the judicial power itself does not have its own representative body at that level (which body could be a body authorized to assume the task of the Ministry in personnel matters, including supervision of the level of professional qualifications of judicial personnel, possibly in other areas of directing and exercising the administration of the judiciary), in the Constitutional Court's opinion does not adequately rule out possible indirect influencing of the judicial power by the executive power (e.g. through allocation of budgetary funds and inspection of their use). However, it is clear from what has already been stated that the previous contested parts of the Act were annulled predominantly with reference to failure to observe the principle of separation of powers. Therefore, in evaluating this part of the provisions contested by the petition, the Constitutional Court itself had to observe this principle. It is not for the Constitutional Court to decide how the issue of court administration should be handled, as that is a task for the legislative power. However, in choosing an administrative model, that power should thoroughly observe the separation of state powers. Therefore, so that the legislature will have adequate room for the passage of a new regulation of court administration, the Constitutional Court has postponed the executability of this part of the decision, i.e. concerning those provisions named in point 2 of the verdict, until 1 July 2003.

Instruction: The decision of the Constitutional Court cannot be appealed.

Brno, 18 June 2002

Joint partially dissenting opinion

of judges J. M., V. Š. a P. V. to the judgment Pl. US 7/02

Similarly like the majority of the judges Of the Constitutional Court we share the opinion of the President of the Republic, as petitioner, that Act No. 6/2002 Coll. (the Act on Courts and Judges) in certain respects violates the balancing of powers in a state governed by the rule of law, as it provides "a disproportionate influence by the executive power on the judicial power", which can endanger the independence of the justice system. This applies specifically to provisions which concern the evaluation of the professional qualifications of judges. As far as this group of provisions goes, we agree with the relevant parts of the verdict and the reasoning of the decision.

However, we have serious reservations about the disproportionately high amount of derogative changes which marks the decision. We believe that some of the key provisions of the Act on Courts and Judges which the decision annuls are not in conflict either with the Constitution or with the principles of a state governed by the rule of law. Therefore, by annulling them, the Constitutional Court has taken its role as the judicial body for protection of constitutionality unjustifiably "generously" and has even entered the area reserved exclusively to the framers of the constitution, by tying its verdict with its opinion de constitutione ferenda. With its derogative changes the Constitutional Court's decision demonstrates a concept of judicial power freed from ties and specific relationships with both of the other pillars of state power, including from such ties and relationships as are not capable of evoking detriment to the independence of courts and judges, and are thus not in conflict with the principles of a state governed by the rule of law. The purpose of a state governed by the rule of law is not, in our opinion, judicial power immersed in itself and isolated from the other powers, but one reasonably cooperating with the legislative and executive powers. Therefore, we cannot agree with the concept of the decision.

* * *

In our opinion the decision went too far in particular in connection with § 74 para. 3 of the Act on Courts and Judges, which it annulled entirely. In doing so, the reasoning of the decision assigned it "key importance", which was reflected in the verdict through the annulment of all other provisions which "arise from § 74 para. 3 or are related to it in content or organization". The first part of this provisions states that an office public administration is not considered to include the office of chairman and vice-chairman of a court, temporary assignment to the Ministry, membership in the Council and the Council for professional qualifications of state prosecutors, membership in advisory bodies of the Ministry, the government and in bodies of the chambers of Parliament. The decision reached the conclusion that § 74 para. 3 is in conflict with Art. 82 para. 3 of the Constitution, which states the office of a judge is incompatible with "any office in public administration". According to the decision, it is not up to the legislature to change the intent of the framers of the constitution by issuing a legal norm which narrows the cited constitutional rule of the incompatibility of the office of a judge with "any" office in public administration.

Of course, in interpreting Art. 82 para. 3 of the Constitution the decision limited itself merely to a linguistic interpretation and did not take into account the actual intent of the framers of the constitution. It thereby reached a faulty conclusion.

On 9 November 2000 the government submitted to the Chamber of Deputies a draft of a constitutional act, which was to amend the Constitution, among other things, by inserting a new Art. 91a, establishing the Supreme Judicial Council, which was to take part in the administration of courts (point 11 of the draft). The background report to the government draft states that "activity in the area of administration of courts which does not belong to the Supreme Judicial Council will continue to be performed by the executive power". A following Act on Courts was to "set mutual connections between the administration of the judiciary performed at the central level by the Supreme Judicial Council and the state administration of courts performed at the central level by the Ministry of Justice".

The Chamber of Deputies subsequently in its roles as the framer of the Constitution discussed the government draft. During the discussion, none of the deputies described the then-existing manner of administration of the judiciary (ties between the Ministry of Justice and officials of individual courts) as being in conflict with the Constitution, and such a conclusion cannot be reached through any interpretation of the debates. By rejection the government draft in the second reading on 17 May 2000 by a practically "constitutional majority" of 114 votes, the framer of the Constitution confirmed the legal status quo of the administration of the judiciary. Thus, it is quite evident that in 2000 the framer of the Constitution interpreted Art. 82 para. 3 of the Constitution to mean that the exercise of state administration of the courts by the chairmen and vice-chairmen of individual courts under the auspices of the Ministry of Justice at the central level is not in conflict with the constitutional rule of incompatibility of the office of a judge with "any offices in public administration". Therefore, § 74 para. 3 of the Act on Courts and Judges, reviewed by the Constitutional Court, does not narrow the constitutional rule of incompatibility in the given regard, but merely confirms its content and scope correctly, as it is interpreted by the framer of the Constitution itself.

The joint exercise (of at least part) of the administration of the justice system by the Ministry of Justice at the central level and by officers of individual courts at lower levels is also not in conflict with the principles of a state governed by the rule of law. It would come into conflict with them only if a particular statutory model of such joint exercise interfered in the independence of the judiciary or of judges. The idea of joint exercise of administration of the justice system as such is also not contested by Recommendation No. (94)12 of the Committee of Ministers of the Council of Europe, on which the reasoning of the decision expressly relies, nor by other international instruments. The model of joint exercise of administration of the justice system is also known in other European states.

We too, in agreement with the reasoning of the decision, believe that it is desirable for the judicial power to have its own representative body at the central level; implementation of this though de constitutione ferenda is, however, exclusively in the power of the framer of the Constitution, and in the current constitutional state of affairs the Constitutional Court cannot use it to measure the constitutionality of the relevant part of § 74 para. 3 of the Act on Courts and Judges. Unfortunately, however, that is exactly what the decision did.

Although we do not agree with the verdict of the decision in relation to the cited part of § 74 para. 3, we share with it the conviction that § 106 para. 1 of the Act on Courts and Judges, whose generality and uncertainty do not meet the requirements "of the law" as it

is interpreted not only by the Constitutional Court, but also by the European Court of Human Rights, is in conflict with the constitutional order.

Independence is not a personal prerogative of a judge, but an inseparable part of the performance of his decision-making activity. This "functional" concept also follows from the cited recommendation of the Committee of Ministers of the Council of Europe (see principle I.2.d). Therefore, a judge may not be forbidden any personal or extra-judicial social ties which occur outside of a causal connection with his decision-making. This also applies to the temporary assignment of a judge to the Ministry or to his activity in advisory bodies to the executive or legislative powers.

In any case, "assignment" to the Ministry in and of itself is certainly not the exercise of an "office" in public administration. It could possibly be in conflict with Art. 82 para. 3 of the Constitution, if, during assignment, a judge assumed an "office' in public administration, i.e. if he independently performed the tasks of state administration and if he were endowed for it with the appropriate authorizations and activity. The temporary nature of the assignment, temporary release from the exercise of the office of a judge, and the judge's consent to the assignment are adequate guarantees against detriment to the independence or impartiality of judges. We consider it undoubted that under the stated conditions the "actual independence" of a judge, on which the reasoning of the decision itself relies, is ensured.

We evaluate the activity of a judge in advisory bodies to the executive or legislative powers analogously. It follows from the "advisory" nature of these bodies that they do not perform an independent "office" in public administration, and mere membership in them cannot be in conflict with Art. 82 para. 3 of the Constitution, even if, at the deontological level, one could agree that such membership cannot be recommended to judges. Of course, this does not lead to conflict of that part of § 74 para. 3 of the Act on Courts and Judges with the constitutional order. Membership in an advisory body in and of itself is not capable of casting doubt on a judge's impartiality, as a postulate required by the Constitution. As state above, neither the Constitution nor the principles of a state based on the rule of law can be interpreted to rule out reasonable cooperation by the judicial power with the executive or legislative powers, provided that during this cooperation there is no pressure, inappropriate influence or other interference toward the judge in connection with the exercise of his decision-making activity (see principle I.2.d of the Recommendation of the Committee of Ministers of the Council of Europe cited above).

The decision of the Constitutional Court went beyond the limits of mere evaluation of constitutionality in the case of the statutory regulation of the education of judges. The central provision of the Act on Courts and Judges in this regard is the second sentence of § 82 para. 2, which the decision annuls in full. We believe that only the part of the sentence beginning with the conjunction "and" to the end of it (the obligation to submit to evaluation of knowledge and awareness) should be annulled.

The decision did not find conflict with the constitutional order concerning § 82 para. 1 and the first sentence of § 82 para. 1, which provides a judge's statutory obligation to consistently educate himself and his statutory responsibility for his professional level. Because the decision annulled the entire second sentence of § 82 para. 2, a judge's statutory obligation to educate himself must interpreted exclusively as an obligation to

educate himself by himself, by independent study. Forms of institutional, organized education cannot be included in this statutory obligation. We do not agree with this restrictive understanding of a judge's responsibility for his level of qualification. We believe that constitutional grounds for annulling the statutory obligation to "participate in professional education in the Judicial Academy and professional preparation organized by the courts" were lacking.

It is true that with some elements of the education of judges it is not only reasonable and purposeful, but also appropriate to insist on organized forms of such education, and that a statute may provide an obligation on judges to take part in them. This applies primarily to those areas of law in which judges could not, in their time, obtain adequate university level education (particularly European law). The extent and specific applications of this obligation depend on the particular situation of the judiciary in a given state. Of course, it cannot be described as incompatible with the constitutional order a priori, flatly and without time restriction.

The Recommendation of the Committee of Ministers of the Council of Europe (94)12 considers this problem as part of the regulation of principle III "Suitable working conditions". Point a) presumes education and training of judges even after their appointment, both by the courts themselves and by other institutions. The text does not indicate that judges could not be given an obligation to participate in them, it is only required that they be without cost.

The circumstance that education is to be provided by the Judicial Academy with certain ties to the executive power cannot represent an actual threat to the independence of judges, if only because § 82 para. 2 second sentence offers a plurality of education institutions (the Judicial Academy and courts themselves – see also § 129 para. 3, which specifically mentions in this regard the Supreme Court and the Supreme Administrative Court). The argument cited in the reasoning of the decision, that professional education through the Supreme Court is, given its current decision-making and other activity, de facto unrealistic, is not relevant in terms of constitutionality. Correction can be achieve by ordinary statutory and lower level procedures (budgetary and personnel reinforcements). The measure of constitutionality cannot be subjected to momentary de facto inadequacies in the judicial education system.

The provision of § 82 para. 2 second sentence represents a guarantee of the plurality of education institutions. This rules out the danger of indoctrination of judges by opinions from a single source and artificial "unity", which the reasoning of the decision unjustifiably finds behind the cited provision. The demonstrative enumeration of institutions in the second sentence ("in particular") also presumes the participation of other educational institutions, including foreign ones. Thus, the second sentence before the conjunction "and" is not in conflict with the constitutional order, and it can be interpreted in a constitutional manner. Therefore, it should not have been annulled in its entirety.

Brno, 2 July 2002

Dissenting opinion

of judge V. G. to the judgment in Pl. US 7/02

The dissenting judge divides his dissenting opinion according to the three basic circles (groups) of issues on which the decision of the Constitutional Court is based.

I. The first circle concerns evaluation of the professional qualifications of judges.

At issue are particularly § 134 to 163 of the Act and the related § 50 para. 1 let. f) and g) other provisions which set tasks on judicial councils relating to evaluation of the professional qualifications of judges, also § 71 para. 1 and § 72 para. 2, second sentence, which, in connection with transferring judges, speak of evaluation of expert qualifications, § 123 para. 3 let. a), § 124 para. 4, § 125 para. 3, § 126 para. 3, § 127 para. 3, which provide the authorization of the Ministry of Justice and court chairmen in evaluating the expert qualifications of judges and some other related provisions [e.g. § 94 let. d)].

Concerning this first circle of questions, the dissenting judge has a dissenting opinion only to the reasoning of the decision on page 13 in the last paragraph (from the word "Undoubtedly" to the end of p. 13) and on page 14 in the continuation of this paragraph (from the word "done" to the end of the paragraph ending with the word "issued").

That text should be replaced by the following text:

"However, the cited provisions do not reflect the difference between experienced judges and beginning judges, who have held their office for a relatively short period. With these judges the evaluation of professional qualifications is necessary, because only the exercise of a judge's office in practice can reliably show what the young judge's qualifications and abilities are. Evaluation of a candidate for judicial office after the end of the traineeship period is thus not sufficient in this regard.

Therefore, it is necessary to include evaluation of professional qualifications in the new legal regulations, though for new judges after 3 years (possibly 5 years) from the time when they assume their office as judge."

This opinion should have been expressed in the reasoning of the Constitutional Court's decision, not in its verdict, so that § 134 para. 1 of the Act would not be annulled, although this provision speaks of the evaluation of professional qualifications of judges … after the passage of 36 months from the time when they assume judicial office. This is because it is also necessary to consider the mutual interconnectedness of § 134 para. 1 of the Act with other provisions which concern evaluation of the professional qualifications of judges.

The dissenting judge is aware that under Art. 93 of the Constitution a judge is appointed to his office without time restriction (including a beginning judge). Thus, the result of evaluation of professional qualifications should with the above-mentioned (beginning) judges not be – under the future legal regulation – in and of itself grounds for termination of the office, but a notice stimulating the judge to improve his professional qualifications. In any case it cannot be ruled out that the new legal regulation will define the concept

“professional qualifications of a judge” from aspects other than does the present § 136 para. 1 of Act No. 6/2002 Coll. Therefore, one can also reason that in a particular case the professional qualifications of a judge can also be a disciplinary violation under § 87 of the Act (e.g. if a judge clearly does not fulfill the obligation to consistently education himself under § 82 para. 2 of the Act).

II. The second circle concerns the obligations of judges to participate in professional education in the Judicial Academy, etc.

In this circle, the dissenting judge has a dissenting opinion to the verdict of the decision, as follows:

1. In § 82 para. 2 second sentence only the end of the sentence, with the words: “and submit to the statutorily provided manner of evaluation and assessment of his professional knowledge and awareness.” should be annulled. Concerning the rest, the petition to annul this provision should have been denied.

2. The petition to annul other provisions in this circle, which more closely specify the obligation of judges to participate in education in the Judicial Academy should have been denied. [This concerns § 130 para. 2, the words “enrollment of judges”, § 131 para. 1 let. a), b), § 132 para. 1 let. a), b), para. 2, the words “of judges”, para. 3.]

The dissenting judge – in contrast to the decision of the Constitutional Court – considers that mandatory education of a judge (including in the Judicial Academy) is not in and of itself in conflict with the constitutional principle of independence of courts and judges (Art. 81, 82 para. 1 of the Constitution), even if such education were organized by the Ministry of Justice, i.e. a component of the executive power. It is undoubted that a judge cannot be bound in decision-making in a particular matter by a legal opinion which was expressed during professional education in the Judicial Academy; one can only – basically – require that a judge not diverge in his decision-making from the settled and generally recognized case law of the general courts and from the case law of the Constitutional Court (Art. 89 para. 2 of the Constitution). In terms of the principle of independence of judges, one cannot overlook the fact that after annulment of evaluation of professional qualifications of judges (see point I. above) – if this opinion of the dissenting judge had been accepted – mandatory professional education of judges in the Judicial Academy would have been preserved, though without the related statutory provisions concerning sanctions.

III. The third circle concerns the exercise of state administration of courts by chairmen and vice-chairmen of courts.

In this circle the dissenting judge has a dissenting opinion to the verdict of the decision, as follows:

1. The dissenting judge does not agree with annulment of § 74 para. 3, which provides which offices or activities are not considered offices in public administration. The petition for annulment of this provision should have been denied. In details one can refer to the reasoning of the dissenting opinion of Constitutional Court judges professor Malenovský and

Dr. Varvařovský to the decision of the Plenum of the Constitutional Court in the same manner.

2. The dissenting judge agrees only with annulment of § 106 para. 1, which provides that the court officer cited there may be removed from his office if he does not duly fulfill his obligations. This reason is formulated sufficiently generally and uncertainly in this provision that it comes into conflict with the principle that (every) law should have foreseeable consequences.

3. The petition to annul the other provisions in this circle, which basically provide that chairmen and vice-chairmen of courts perform, in addition to decision-making activity, state administration of courts, should be denied. [This concerns § 15 para. 2 second sentence, § 26 para. 2 second sentence, § 30 para. 2 second sentence, § 34 para. 2 second sentence, §119 para. 2 and 3, § 120, § 121, also § 124, 125, 126 and 127 – except paragraph 4 in § 124 and except paragraph 3 in § 125, 126 and 127, which concern the first circle of questions (evaluation of professional qualifications of judges)].

The dissenting judge – in contrast with the Constitutional Court's decision – considers that the exercise of state administration of a court by the chairman and vice-chairman of the court (i.e. by a judge) is not in conflict with the principle of independence of courts and judges and with the principle of separation of powers. (In any case, the Constitutional Court's decision itself states that by the derogation of § 74 para. 3 of the Act it did not intend to indicate that the direction and administration of courts should be entrusted to persons other than those from among the ranks of judges.) In this regard one naturally cannot avoid the consideration of which body should perform state administration of a court, in a manner so as to preserve the principle of separation of powers, without affecting the legitimate requirement for the administration of courts to be functional and speedy.

Said more simply, the following possibilities come into consideration:

a) performance of state administration of courts by a special administrative body which is not part of the judicial power. At one time a comparable body (to a certain extent) existed in Czechoslovakia. This was the "regional state administration" which did not hold up in practice. In historical fact this was an extended arm not only of the Ministry of Justice but also – de facto – of local communist party bodies. This model is undoubtedly unacceptable.

b) performance of state administration of courts by a self-governing collective body of the judges of a particular court. It is obvious that such a body would hardly be functional, as the standard day-to-day direction of courts requires speedy and functional decision-making, which the judicial personnel could not conduct effectively.

c) performance of state administration of courts by the chairman and vice-chairman of a court under the above-mentioned (now annulled by the Constitutional Court) provisions of the Act on Courts and Judges. This is a model which has held up in practice and there are no serious signals indicating that through it there would be interference in the independent decision-making of courts. Thus, one can conclude that this model, i.e. the performance of the state power of a court by a judge – including the chairman and vice-chairman of a court – is, in terms of observing the independence of judges and also with

regard to the necessary functionality of administration of courts the most suitable model, which is not in conflict with the Constitution of the Czech Republic. Of course, de lege ferenda it would be appropriate for basic questions of the administration of a court be discussed with the representative body of judges' self-government.

4) In the opinion of the dissenting judge the petition to annul part of § 68 para. 1 and § 99 para. 1 let. c), concerning the possibility of temporarily assigning a judge not only to another court, but also to the Ministry (of Justice) should also have been annulled. In contrast with the reasoning of the Constitutional Court's decision, the dissenting judge believes that temporary assignment of a judge to the Ministry is not in conflict with article 82 para. 3 of the Constitution. This article provides that the office of a judge is not compatible with the office of the President of the Republic, a Member of Parliament, or with any other office in public administration. It is evident that the activity of a judge temporarily assigned to the Ministry is not an office in public administration. The purpose of such assignment is to make use of judicial experience (cf. § 68 para. 1 in fine), so the activity is basically an advisory one. This also corresponds to practical experience concerning the work of judges who were temporarily assigned to the Ministry. In any case, it cannot be overlooked that this institution is restricted in time to a period of 1 year and that it is contingent on the consent of the relevant judge.

Brno, 18 June 2002